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AUTHOR Reutter, E. Edmund
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ABSTRACT

In March of 1971, the Supreme Court of the United States ruled that "if an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Although the decided case concerned discrimination on the basis of race, the act also bars discrimination because of religion, sex, or national origin. The instant case was brought as a class action by black employees of a North Carolina plant of the privately owned Duke Power Company. Some four months after this Supreme Court decision, a Federal District Court issued an injunction halting the use in the New York City school system of certain examinations as a basis for appointment to supervisory or administrative posts. This court, although noting "Griggs vs. Duke Power Company", based its ruling on constitutional grounds. At the time the suit was instituted, obtaining a permanent supervisory position required not only meeting State certification requirements but also obtaining a City license. The latter was attainable only on passing an examination prepared by the Board of Examiners. Plaintiffs were a black and a Puerto Rican, both of whom had State Certificates, met educational and experience requirements of the City Board, and were serving as acting principals of elementary schools.
(Author/JM)

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Law

E. Edmund Reutter

Tests and Employment Discrimination

In March of 1971 the Supreme Court of the United States rendered a decision of far-reaching implications in the area of civil rights.[1] Strangely, the unanimous decision received relatively little immediate attention in public employment circles, probably because it interpreted a section of the Civil Rights Act of 1964 that applied only to private employment. The reasoning of the Court, however, followed a line which could easily be extended to cases arising under the equal protection clause of the Fourteenth Amendment. Indeed, some lower courts had utilized it before the opinion of the Supreme Court was given direct application to the public schools by Congressional action in 1972 broadening coverage of the employment provisions of the Civil Rights Act to include public employment at all levels of government.[2]

Perhaps the key conclusion of the Supreme Court was that "if an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Although the decided case concerned discrimination on the basis of race, the Act also bars discrimination because of religion, sex, or national origin. Thus the holding would be applicable to cases involving discrimination on any of the prohibited bases.

The instant case was brought as a class action by black employees of a North Carolina plant of the privately owned Duke Power Company. Prior to July of 1965 (the effective date of the Civil Rights Act of 1964) the company "openly discriminated on the basis of race in the hiring and assigning of employees" at the plant. When the company in 1965 abolished its policy of employing blacks only in one department (the Labor Department), it made the completion of high school a condition for transfer from that department. For a decade there had been the requirement of high school graduation for initial employment in the other departments.

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ABOUT THE AUTHOR: E. Edmund Reutter, Jr., Professor of Education, Teachers College, Columbia University, has done extensive writing in the field of Education Law, is co-author with Robert R. Hamilton of THE LAW OF PUBLIC EDUCATION (Foundation Press 1970), supplemental edition 1973. He has served as President of the National Organization on Legal Problems of Education.

LAW [*continued from page 1*]

which were staffed with whites. However, whites hired before the requirement was instituted continued to advance.

A further requirement added by the company when the federal statute became effective was that new employees in any but the Labor Department must pass two "professionally prepared aptitude tests," as well as have a high school education. Two months later, incumbent employees in the Labor Department who lacked a high school education were permitted to qualify for transfer by passing the Wonderlic Personnel Test (for general intelligence) and the Bennett Mechanical Aptitude Test. The cut-offs approximated the national median scores for high school graduates, and thus were more stringent than the requisite of high school completion.

The Court began its analysis by looking to Congressional intent:

> The objective of Congress in the enactment of Title VII [of the Civil Rights Act of 1964] is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

It was undisputed that the record in the case showed that whites fared much better than blacks on the company's criteria. For example, in 1960 almost three times as many North Carolina white males had completed high school as had black males, and in one sample using the Wonderlic and

Bennett tests as part of a battery, 58% of whites passed as compared with only 6% of blacks.

The Court said:

> This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools. . . .
>
> Congress has now provided that tests or criteria for employment or promotion may not provice equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

The Court's acceptance of a "results" test without a need to show segregative intent by the employer was of great significance. It put employers who may be insensitive "innocents" in the same legally indefensible position as "contrivers" of plans for discrimination in employment.

At the same time the Court observed:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of eacial or other impermissible classification.

Examining the record of the case, the Court concluded:

> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted. . .without meaningful study of their relationship to job-performance ability. . .
>
> The evidence. . .shows that [white] employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.

The company contended that its general intelligence tests were permitted because the Civil Rights Act specifically authorized the use of "any professionally developed ability test . . . [not] designed, intended, or used to discriminate" against a protected class. The Court disagreed. It examined the records of Congress, which showed that the intent was to permit the use only of "job-related" tests. But, said the Court, "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." Furthermore, permissible tests must "measure the person for the job and not the person in the abstract."

Some four months after this Supreme Court decision a federal district court issued an injunction halting the use in the New York City school system of certain examinations as a basis for appointment to supervisory or administrative posts.[3] This court, although noting Griggs, based its ruling on constitutional grounds (the Civil Rights Act section on employment not yet having been made applicable by Congress to public employers). The decision, subsequently upheld on appeal,[4] sent tremors through the ranks of professional test-makers as well as school authorities.

New York City's Board of Examiners in its seven decades of existence had gained considerable prominence in the field of testing for employment in public schools and was frequently favorably cited by advocates of the "merit system" for employment. But concurrently, and particularly in recent years, the Board of Examiners had been subjected to criticism by educators who believed the Examiners' tests and procedures hampered educational progress. In fact, the New York City Board of Education (which had no authority over how the Board of Examiners conducted tests to meet criteria set by the Board of Education) did not actively oppose the injunction and did not appeal after it was granted. The system's chancellor (superintendent), in a memorandum to the Board of Education that was quoted by the district judge, stated that to defend the arrangement "would require that I both violate my own professional beliefs and defend a system of personnel selection and promotion which I no longer believe to be workable." When the district court's decision was appealed by the Board of Examiners, seven amicus curiae briefs were submitted against the district court's decision and three were submitted in support of it.

At the time the suit was instituted, to obtain a permanent supervisory position in the school system an applicant was required not only to meet state certification requirements for the position but also to obtain a city license. The latter was attainable only upon passing an examination prepared by the Board of Examiners. Plaintiffs were a black and a Puerto Rican, both of whom had state certificates, met educational and experience requirements of the city board, and were serving as acting principals of elementary schools by actions of community school boards. They claimed that the test which stood as an obstacle between them and permanent appointments as principals was racially discriminatory and, therefore, unconstitutional.

Based on comparative pass rates of members of different ethnic groups who had taken various supervisory examinations in recent years, the trial court concluded that:

> [T]he examinations prepared and administered by the Board of Examiners for the licensing of supervisory personnel, such as Principals and Assistant Principals, have the de facto effect of discriminating significantly and substantially against Black and Puerto Rican applicants. . . .
>
> Such a discriminatory impact is constitutionally suspect and places the burden on the Board to show that the examinations can be justified as necessary to obtain Principals, Assistant Principals and supervisors possessing the skills and qualifications required for successful performance of the duties of these positions. The Board has failed to meet this burden.

While trying the case, the court had ordered a survey covering 50 supervisory examinations involving some 6,000

applicants given over a period of several years. Based on all the examinations, white candidates passed "at almost 1 ½ times the rate of Black and Puerto Rican candidates." On the examination for assistant principal of a junior high school, the rate of whites passing was "almost double the rate of Black and Puerto Rican candidates." On the examination for assistant principal of a junior high school, the rate of whites passing was "almost double the rate of Black and Puerto Rican candidates"; for assistant principal of an elementary school the white rate was one-third greater. The judge attached added significance to the assistant principal examinations because they "screened minority applicatns out of a chance to become full principals, thus in effect magnifying the overall statistical differences between white and non-white pass-fail rates."

In addition the trial court examined statistics on non-whites in supervisory positions in some other cities. Data showed "a startlingly higher percentage of blacks and Puerto Ricans in supervisory positions" in the other cities.

The Board of Examiners argued before the higher court that the district judge had misinterpreted much of the statistical data and had drawn unsupportable conclusions. The Court of Appeals said:

> Throughout the briefs of the Board and its supporters runs the argument that other reasons can be inferred from the record for the comparatively low numbers of blacks and Puerto Ricans in supervisory positions. That may very well be true. But the question before us is whether the trial judge on the record before him was required to accept those inferences, and it is quite clear that he was not. In sum, while not all of us might have made the same factual interences of racially discriminatory effect from the statistical evidence, both documentary and oral, before the court, none of us can say with the firm conviction required that those factual findings were mistaken.

However, that the examinations discriminated against black and Puerto Rican applicants would not, standing alone, necessarily entitle the plaintiffs to relief. The further question was whether the tests could be "validated as relevant to the requirements of the positions" for which they were given. On this point the district court "had to choose between conflicting expert testimony covering the issue of job-relatedness." Operating on the premise that "the Board had the burden of making a 'strong showing' that the tests were in fact job-related," the trial court concluded that the burden was not met as regards the written parts of the examinations.

In rejecting the Board's claim that the lower court had erred on this point, the Court of Appeals said:

> We cannot say that the judge erred. It is clear, of course, that he was not required to accept the views of the Board's experts. In sum, what we said earlier applies here as well: While not all of us might have made the same factual finding on the questions of job-relatedness as the district judge did, his finding was not clearly wrong.

Finally the Board contended that the findings of the trial court were not of such a magnitude as to warrant an injunction against the use of the examinations. The appellate court disagreed, saying:

> [O]nce discrimination has been found it would be anomalous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests. [Citation to Griggs, supra]. The anomaly would only be emphasized by the recent passage of the Equal Employment Opportunity Act of 1972, which broadened Title VII to include state and city public employers.

The Court of Appeals then addressed the "fears of those individuals and groups that have filed strong and even passionate briefs, urging us to reverse:"

> We share their concern for the public school system; its strength is crucial in our society. But emotion has led some of the amici astray in describing the decision of the court below. The judge did not approve of a quota system for the appointment of supervisory personnel; he specifically rejected the idea. Nor did he permanently do away with the merit system and substitute nepotism and patronage. The judge did not outlaw other written examinations or indicate that none could be created to test more fairly the qualities necessary for a supervisory job.

Challenges to traditional employment requirements that may disadvantage some applicants are rapidly increasing. Educators seem to have an opportunity to help not only their own institutions, but society as a whole, to resolve the several crucial dilemmas faced. It is legally no longer possible for employers, public or private, to hide behind the shield of good intentions, even when that shield is conscientiously raised, for the Supreme Court has interpreted federal law as follows:

> Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Citations

1. Griggs v. Duke Power Company, 91 S Ct. 849 (1971).
2. See Reutter, E. Edmund, Jr., and Hamilton, Robert R., The Law of Public Education, 1973 Supplement (Mineola, New York: Foundation Press, 1973), pp. 98-100 and 102-110.
3. Chance v. Board of Examiners and Board of Education of City of New York, 330 F. Supp. 203 (S.D.N.Y. 1971).
4. Chance v. Board of Examiners, 458 F. 2d 1167 (2 Cir. 1972).